

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/05-01/09

Date: 12 June 2015

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Chang-ho Chung

**SITUATION IN DARFUR, SUDAN
IN THE CASE OF**

The Prosecutor v Omar Hassan Ahmad AL BASHIR ("Omar Al Bashir")

Confidential

Prosecution's Urgent Response to the Registry's submission titled "Urgent request from the Authorities of South Africa" (ICC-02/05-01/09-239-Conf)

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Registrar notified¹ the Chamber today that representatives of South Africa wished to consult pursuant to article 97 of the Statute regarding Omar Al Bashir's² imminent trip to South Africa tomorrow. While the Prosecution welcomes efforts by States Parties to consult with the Court regarding the arrest of suspects, in the current circumstances, the law establishing South Africa's obligation to arrest Omar Al Bashir is clear.³ Hence a consultation in this instance is unnecessary. Rather, the Chamber should issue a decision today confirming South Africa's obligation to arrest Mr Al Bashir.

2. In the alternative, should the Chamber find that consultations are necessary the Prosecution requests that they take the form of a hearing before Pre-Trial Chamber II⁴ with the legal representatives of South Africa, the Prosecution and the Registry in attendance.

3. As Mr Al Bashir is due to travel tomorrow, the Prosecution submits that the circumstances demand that the hearing should take place today. The Prosecution requests that the Chamber issue a decision immediately upon the conclusion of the above hearing.

Confidentiality

4. The Prosecution submits this filing as confidential pursuant to regulation 23 *bis*(2) of the Regulations of the Court, since it cites a submission by the Registry that bears the same classification.

¹ ICC-02/05-01/09-239-Conf ("Registry notification regarding consultations").

² "Mr Al Bashir".

³ ICC-02/05-01/09-195, paras.29-34.

⁴ "Chamber".

Procedural history

5. On 31 March 2005, the United Nations Security Council acting under Chapter VII of the Charter of the United Nations adopted Resolution 1593 (2005)⁵ referring the situation in Darfur to the Court. The United Nations Security Council decided in the context of cooperation with, and assistance to, the Court that it "...while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully".⁶

6. On 14 July 2008, the Prosecution filed its application for an arrest warrant for Omar Al Bashir.⁷ On 4 March 2009, Pre-Trial Chamber I issued an arrest warrant for Omar Al Bashir for seven counts of crimes against humanity and war crimes. In the arrest warrant, Pre-Trial Chamber I found that "under article 58(1) of the Statute, the arrest of Omar Al Bashir appears necessary at this stage to ensure (i) that he will appear before the Court; (ii) that he will not obstruct or endanger the ongoing investigation into the crimes for which he is allegedly responsible under the Statute; and (iii) that he will not continue with the commission of the above-mentioned crimes."⁸

7. On 5 and 6 March 2009, the Registry submitted three filings to Pre-Trial Chamber I, detailing transmission of the warrant of arrest and the requests for its implementation to the Government of the Republic of the Sudan ("the Sudan"),⁹

⁵ "UNSC".

⁶ Resolution 1593 (2005), adopted by the Security Council at its 5158th meeting, on 31 March 2005. S/RES/1593 (2005), Operative Paragraph 2.

⁷ ICC-02/05-157.

⁸ ICC-02/05-01/09-1.

⁹ ICC-02/05-01/09-5.

to all Rome Statute States Parties¹⁰ and to all United Nations Security Council members that are not States Parties to the Rome Statute.¹¹

8. On 12 July 2010, Pre-Trial Chamber I issued a second arrest warrant for Omar Al Bashir for three counts of genocide.¹² The Registry subsequently transmitted requests and supplementary requests for the arrest and surrender of Omar Al Bashir to States Parties, Non-States Parties Members of the United Nations Security Council and the Sudan.

9. On 28 May 2015, the Registry notified a *note verbale* to the Embassy of South Africa in the Kingdom of the Netherlands reminding this State Party of its obligation to arrest Omar Al Bashir and to consult with the Court without any delay, should it foresee any difficulties in implementing the request for cooperation.¹³

10. On 12 June 2015, the Registry submitted the Registry notification regarding consultations and sought guidance from the Chamber.¹⁴

Submissions

Precedent requires that South Africa is obliged to arrest Omar Al Bashir

11. The legal framework establishing South Africa's obligation to arrest Omar Al Bashir is clear. In its Decision on the Cooperation of the Democratic Republic of

¹⁰ ICC-02/05-01/09-7.

¹¹ ICC-02/05-01/09-8.

¹² ICC-02/05-01/09-95.

¹³ ICC-02/05-01/09-239-Conf. para.1.

¹⁴ ICC-02/05-01/09-239-Conf.

the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court of 9 April 2014 ("9 April 2014 Decision") Pre-Trial Chamber II held that:

...by issuing Resolution 1593(2005) the SC decided that the "Government of Sudan [...] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution". Since immunities attached to Omar Al Bashir are a procedural bar from prosecution before the Court, the cooperation envisaged in said resolution was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities. Any other interpretation would render the SC decision requiring that Sudan "cooperate fully" and "provide any necessary assistance to the Court" senseless. Accordingly, the "cooperation of that third State [Sudan] for the waiver of the immunity", as required under the last sentence of article 98(1) of the Statute, was already ensured by the language used in paragraph 2 of SC Resolution 1593(2005). By virtue of said paragraph, the SC implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State.¹⁵

12. Consequently, *"...there also exists no impediment at the horizontal level..."* regarding the arrest and surrender of Mr Al Bashir. Additionally, as per the 9 April 2014 Decision, since the Security Council, acting under Chapter VII, has lifted the immunities of Omar Al Bashir by virtue of Resolution 1593(2005), South Africa cannot invoke any other decision, including that of the African Union, providing for any obligation to the contrary.¹⁶

13. Thus, the case law of the Court has made clear that States Parties are legally obliged to arrest Mr Al Bashir pursuant to the legal framework of the Rome Statute. There is accordingly no ambiguity regarding this obligation that would require clarification.

¹⁵ 9 April 2014 Decision at para.29.

¹⁶ 9 April 2014 Decision at paras.30-31. The Prosecution notes in this context that by virtue of article 103 of the UN Charter, obligations arising from the SC Chapter VII resolutions, such as Resolution 1593 (2005), prevail over any other international obligation of a member state of the United Nations (see articles 25 and 103 of the UN Charter).

Any consultations should take the form of a hearing

14. In the alternative, should the Chamber find that consultations are necessary, the Prosecution requests that they take the form of a hearing before Pre-Trial Chamber II featuring the legal representatives of South Africa, the Prosecution and the Registry.

15. As Mr Al Bashir is due to travel tomorrow, the Prosecution submits that the circumstances demand that the hearing should take place today at 17:00. The Prosecution requests that the Chamber issue a decision immediately upon the conclusion of the above hearing.

Request for Relief

16. Due to the foregoing, the Prosecution requests that the Chamber issue a decision today confirming South Africa's obligation to arrest Mr Al Bashir without recourse to consultations.

17. Should the Chamber find that consultations are necessary the Prosecution respectfully requests that the Chamber schedule a hearing featuring the legal representatives of South Africa, the Prosecution and the Registry for 17:00 today. The Prosecution requests further that the Chamber issue a decision immediately upon the conclusion of the above hearing.

18. Finally, the Prosecution requests the Chamber to order that any decision it issues must be implemented immediately, must not be delayed by any

subsequent filings on this issue, and that no stay of the decision shall be permitted.



Fatou Bensouda, Prosecutor

Dated this 12th day of June 2015

At The Hague, The Netherlands